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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL M. CUBEL,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 32A04-0605-CV-268
	)	
DEBRA A. CUBEL,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable David H. Coleman, Judge
Cause No. 32D02-0409-DR-133

April 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Michael M. Cubel appeals the order dissolving his marriage to Debra A. Cubel. We consolidate, reorder, and restate Michael's issues as:

1. Whether the award of spousal maintenance to Debra was clearly erroneous;

2. Whether the child support order was an abuse of discretion or otherwise erroneous.

We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

On August 26, 1986, Debra gave birth to Michael's daughter, Brittany. The parties married on November 19, 1988. During the marriage, Debra worked in the home, while Michael was employed outside the home. Since 1994, Michael has worked at the Ford[1] factory on the east side of Indianapolis.

Debra filed a petition for legal separation on August 2, 2004. On March 17, 2005, she modified that petition to one for dissolution.

Brittany was a full-time student at the University of Southern Indiana in Evansville during the fall semester of 2005. In December of 2005, around the time of the final hearing, Brittany moved home to live with Debra and to attend Ivy Tech State College.

[1] For a period of time, Visteon owned the auto-parts factory. However, as it was initially and is again owned by Ford, we refer to it as the Ford factory.

DISCUSSION AND DECISION

Michael appeals the dissolution order, which contains findings of fact and conclusions of law.[2] Where a court includes findings and conclusions, our review is two-tiered. *Dedek v. Dedek*, 851 N.E.2d 1048, 1050 (Ind. Ct. App. 2006). First, we evaluate the findings to determine whether the evidence in the record supports them; then we determine whether the findings support the judgment. *Id.* As we conduct our review, we consider only the evidence and reasonable inferences therefrom most favorable to the judgment, and we may neither reweigh the evidence nor reassess the credibility of the witnesses. *Id.*

As a preliminary matter, we note a number of Michael's arguments are premised on an insufficiency of the evidence to support the trial court's findings. However, Michael did not provide a complete transcript of the final hearing.[3] The record indicates the final hearing occurred over two days, November 4, 2004, and December 16, 2004. Michael provided transcripts of his 183 pages of testimony and of Debra's 32 pages of testimony on December 16, 2004. Debra notes the court "heard at least three hours of evidence on November 4," (Appellee's Br. at 10), and she notes sections of Michael's

[2] It is not clear whether one of the parties requested those findings and conclusions.

[3] Michael claims he was required to file only those portions of the record from the trial court that were necessary to address his arguments. We agree with that premise. However, we find misplaced his reliance on *Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004). Pabey did not request or file with the appellate court any portion of the transcript of evidence because he accepted the trial court's findings as correct and his questions on appeal did not rely on any evidence outside the court's findings. *Id*. at 1142. Accordingly, none of Pabey's issues required reference to the transcript. In contrast, Michael challenges the sufficiency of the evidence to support the court's findings; to address sufficiency questions we need all the evidence produced at the final hearing.

testimony suggest the court heard from other witnesses on December 16.[4] In addition, the first page of Debra's testimony indicates counsel asked "to re-call Debbie Cubel," (Tr. of Debra at 3), which suggests we have only a portion of Debra's testimony.

"[A] cause cannot be reversed for the insufficiency of the evidence to sustain the finding and judgment of the lower court unless the record clearly shows that all of the evidence is in the record." *Swiggett v. Swiggett*, 237 Ind. 541, 543, 147 N.E.2d 220, 221 (1958). Michael has not provided sufficient information to permit us to review his allegations. *See id.*

In his reply brief, Michael asserts:

> *Arguendo*, if Debra thought the testimony was relevant to these issues, she could have sought supplementation of the record. She did not. The very fact she did not supplement the record to bolster or defend her position not only constitutes her waiver of this argument, but underscores the inference that nothing in a supplemented record would have supported her position.

(Reply Br. at 5-6.) We decline Michael's invitation to hold his own failure to provide a complete record results in a waiver of his opponent's argument. Under his reasoning, criminal defendants could assert insufficient evidence supports their convictions and file appendices containing only their own self-serving testimony; then, the burden would fall on the State to produce the remainder of the transcript of evidence. Such a process would be inefficient, would delay the briefing schedules for Appellees and for Appellants who choose to file reply briefs, would cause additional work for this court and the Clerk's Office, and would shift the financial burden of appeals from the Appellant to the

[4] Twice during Michael's testimony, his counsel mentions she is waiting for two other witnesses to arrive to testify. (Tr. at 123-23; 146.)

Appellee. For all these reasons, we reject Michael's attempt to place any of the burden to produce the transcript on Debra, when she did not raise issues on cross-appeal.[5]

Accordingly, we decline to address Michael's allegations of insufficient evidence. *See Swiggett*, 237 Ind. at 543, 147 N.E.2d at 221 ("We regret our inability to determine this appeal on the merits of such questions raised by appellant dealing with the evidence, but it would be hazardous for us to indulge in presumptions as to what some of the absent evidence would be."). Where possible, we address the rest of his arguments.

1. Spousal Maintenance

Either party to a dissolution action or legal separation action may file a motion for temporary maintenance. Ind. Code § 31-15-4-1(a)(1). Such motions must be accompanied by an affidavit setting forth the facts supporting the motion and the amount requested. Ind. Code § 31-15-4-2. A trial court is required to set such motions for hearing, Ind. Code § 31-15-4-4, and must hold the hearing and rule on the petition within twenty-one days after the petition is filed. Ind. Code § 31-15-4-6. "The court may issue an order for temporary maintenance or support in such amounts and on such terms that are just and proper." Ind. Code § 31-15-4-8. Such an order automatically terminates when the final decree is entered. Ind. Code § 31-15-4-14.

On August 2, 2004, Debra filed a petition for separation that also requested temporary maintenance. The court set the petition for a hearing on August 19, 2004. On August 18, 2004, Michael filed motions for change of judge and for continuance of the

[5] When an appellee cross-appeals, raising issues not raised by the appellant, the appellee is required to produce whatever portions of the trial record were not produced by the appellant and are necessary to address the cross-appeal issues. *See* Ind. Appellate Rule 50(A)(3).

hearing. The new judge obtained jurisdiction on September 23, 2004, and four days later, he set the provisional hearing for November 12, 2004. Debra moved for continuance and the court reset the hearing for January 12, 2005. Michael moved for continuance, and the court reset the hearing to February 2, 2005. Michael moved for continuance, and the court reset the hearing for March 2, 2005. The court reset the hearing for April 26, 2005.[6] The court on its own motion reset the hearing for May 10, 2005. On April 26, 2005, Michael filed a motion to set the final hearing. On April 28, 2005, the court reset the preliminary hearing for July 26, 2005, and set the final hearing for September 9, 2005. On July 26, 2005, Debra moved to vacate the preliminary hearing

> for the reason that the parties have agreed that all pending issues shall be heard at the final hearing and as such the preliminary hearing is no longer necessary. This matter is scheduled for final hearing . . . at which time any pending issues shall be addressed.
>
> Opposing counsel has no objection to this motion.

(Appellant's App. at 51.) Then, on the court's motion, it reset the final hearing to November 4, 2005. The final hearing began that day and finished on December 16, 2005. In the final order, the court concluded:

> **12.** Any payments received by Wife from Husband during the pendency of this matter shall be considered in the form of spousal maintenance and are not property settlement. There is a large disparity in income and potential income. The payments received were necessary to assist Wife in securing full-time employment and in continuing to maintain stability for the parties' daughter.

(*Id.* at 27.) Michael questions that paragraph on a number of grounds.

First, Michael asserts Debra's request for temporary maintenance was inadequate

[6] The Chronological Case Summary ("CCS") does not indicate whether either party requested this continuance. We will presume the court continued the hearing on its own motion.

because she did not attach the affidavit required by Ind. Code § 31-15-4-2. That statute provides:

> Except for a protective order under section 1 of this chapter, the motion must be accompanied by an affidavit setting forth the following:
> (1) The factual basis for the motion.
> (2) The amounts requested or other relief sought.

Ind. Code § 31-15-4-2. Debra "concedes that no separate Affidavit was submitted to the trial court," (Appellee's Br. at 12); however she requests we find her "pleadings were in substantial compliance with statutory provisions," (*id.*), because the petition "was verified by Wife under penalties for perjury and was witnessed by Wife's counsel." (*Id.*) Ind. Trial Rule 11(B) states:

> When in connection with any civil or special statutory proceeding it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind, be verified, or that an oath be taken, it shall be sufficient if the subscriber simply affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:
>
> "I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.
>
> (Signed) _____"
>
> Any person who falsifies an affirmation or representation of fact shall be subject to the same penalties as are prescribed by law for the making of a false affidavit.

Because Debra's pleading was affirmed in accordance with Trial Rule 11(B), we do not find the absence of a jurat controlling. *See Yang v. Stafford*, 515 N.E.2d 1157, 1160 (Ind. Ct. App. 1987).

Second, Michael claims the order of temporary maintenance was erroneous because the court failed to hold the hearing within 21 days of the petition. As Michael caused the continuance of the hearing that was set in accordance with the statutory

requirements he now questions, he cannot be heard to complain that hearing did not occur within that timeframe. Moreover, of the seven continuances of the preliminary hearing that occurred before the parties agreed to resolve all pending issues at the final hearing, Michael requested three and the court ordered three on its own motion. Because Debra requested only one of the continuances, we decline to deny her the opportunity to have her issue heard on the ground the hearing was not held soon enough.

Michael also asserts the court could not award temporary maintenance because, when Debra filed her motion to convert the petition for legal separation into a petition for divorce, she did not restate her request for temporary maintenance in the petition for divorce and she did not incorporate the prior motion into the new motion. We disagree. Debra's Motion to Convert Legal Separation to Dissolution of Marriage states:

> 6. That this matter is currently set for a hearing on April 26, 2005 at 3:00 p.m. and Petitioner requests that this matter remain on the Court's calendar for that same date and time to address preliminary issues including child support, spousal maintenance and custody.

(Appellant's App. at 35-36.) We find that language sufficient to incorporate the preliminary issues pending from the petition for legal separation into the petition for dissolution.

Next, Michael claims Debra waived her right to temporary maintenance when she informed the court, on July 26, 2005, that a preliminary hearing was no longer necessary. We disagree, because Debra's motion stated "all pending issues shall be heard at the final hearing." (Appellant's App. at 51.) At that time, temporary maintenance was a "pending issue," and therefore, we see no logic in requiring Debra to have specifically "included

reference to it as an outstanding issue." (Appellant's Br. at 13.) We also note that, because any preliminary order can be re-litigated at the final hearing, requiring the parties to have litigated this issue twice within six weeks seems ill-advised from both financial and judicial economy perspectives.

Finally, Michael asserts the court erred in ordering maintenance because neither Debra nor their child was "incapacitated." Michael relies on Ind. Code § 31-15-7-2, which addresses a maintenance award that continues after the final dissolution. But the order herein was for temporary maintenance, which is controlled by Ind. Code § 31-15-4-8. Such maintenance "may" be ordered "in such amounts and on such terms that are just and proper," *id.*, and "automatically terminates when the final decree is entered." Ind. Code § 31-15-4-14. The finding of "incapacity" contemplated in Ind. Code § 31-15-7-2 is not necessary for an award of temporary maintenance.[7] *Paxton v. Paxton*, 420 N.E.2d 1346, 1349 n.2 (Ind. Ct. App. 1981).

Because all of Michael's arguments regarding paragraph twelve of the court's order fail, we affirm that portion of the court's order.

2. Child Support

We presume the court's calculation of support is valid and review it for an abuse of discretion. *Thompson v. Thompson*, 811 N.E.2d 888, 924 (Ind. Ct. App. 2004), *reh'g denied*, *trans. denied*. An abuse of discretion occurs if the decision is "clearly against the logic and effect of the facts and circumstances before the court or if the court has

[7] To the extent Michael argues the evidence was insufficient to support temporary maintenance, we are unable to address that argument because Michael provided an inadequate record.

misinterpreted the law." *Id.*

The court made the following findings and conclusions regarding child support:

> A. Based on the evidence, the Court finds that Husband is capable of earning and has consistently earned overtime income. The Court finds that Husband earns $1,315.00 per week and that Wife is capable of earning $400.00 per week. Husband shall not receive an overnight credit for parenting time.
>
> B. Accordingly, Husband shall pay Wife $181.00 per week in child support for Brittany. Said support shall be paid directly to the Indiana Child Support Bureau in a timely manner via an Income Withholding Order to be prepared by Wife's counsel. Husband's support obligation shall be retroactive to the date of the final hearing, the same being December 16, 2005. Husband has paid $105.00 in child support since the date of the final hearing. Husband shall pay an additional thirty dollars ($30.00) per week towards the outstanding arrearage until such time as it is paid in full.
>
> C. Husband shall continue to maintain medical, dental and optical insurance coverage for Brittany until such time as she is twenty-three years of age or otherwise emancipated.
>
> D. Effective with the date of this decree, Wife shall pay the first six percent, or $737.00, each calendar year, of Brittany's uninsured, non-elective (non-cosmetic) medical, dental, orthodontic, optical, prescription, and hospitalization expenses for the minor child until such time as Brittany is emancipated. After Wife has satisfied the first six percent, the Husband shall pay 77% and the Wife shall pay 23% of the uninsured expenses.
>
> E. The paying party shall provide the other parent with a copy of the receipt for said expense. The non-paying party shall reimburse the other party his one-half share of the uninsured expense within 30 days of his receipt of the same.
>
> F. Husband shall be entitled to claim Brittany as a dependant [sic] tax exemption in so [sic] long as Husband is current in his child support obligation as of December 31st of the tax year he is claiming.
>
> G. College Expenses – Brittany is attending Ivy Tech State College. She has displayed the aptitude and ability to be a successful college student. Effective the Spring 2006 semester and continuing until the Spring semester of 2009 or until such time as Brittany obtains a bachelors degree, whichever occurs first, the parties shall assist Brittany in her pursuit of a college education. Brittany shall first apply for all scholarships and grants available to her through all sources. After all scholarships and grants have been applied to the total cost, the parties shall divide all college expenses including, but not limited to room/board (if applicable), tuition, books, mandatory fees and transportation expense

> directly to the college/university in a timely manner. Husband shall continue to apply for any scholarships or grants available to him through his employer. Wife has paid for the Spring 2006 semester. Husband shall reimburse his percentage of said expense to Wife within 10 days of the Court's approval of a decree.
>
> Husband paid for the Fall 2005 semester. Based on the disparity in income between the parties, Wife should be held responsible for payment of books, computer printer and any 'extra' food expenses for Brittany for this semester, which have been paid. Husband shall be entitled to any refund from his employer as a result of the scholarship/grant received by Brittany.

(Appellant's App. at 20-21.)

Michael first claims the court's child support order is erroneous because the court did not attach a completed child support worksheet and did not explain the basis for its calculations. As Debra's Appendix demonstrates, the court's findings regarding the parties' incomes and Michael's support obligation mirror those found on the Child Support Worksheet Michael submitted with his Proposed Findings of Fact on February 2, 2005. (Appellee's App. at 20.) If any errors occurred in the calculations of income and basic support, Michael invited them, and he cannot now complain. *See Balicki v. Balicki*, 837 N.E.2d 532, 541 (Ind. Ct. App. 2005), *trans. denied* 855 N.E.2d 997 (Ind. 2006) (declining a husband's invitation to find error in a court's determination two assets were marital property, when the husband had listed those two assets as marital property subject to division on his proposed property division). Because the court utilized the worksheet Michael submitted, we do not address his claim the court erred by failing to explain its determination of incomes or to attach its own child support worksheet.

Michael claims the court erroneously found Brittany would be attending Ivy Tech in the spring of 2006, when the record contained no evidence to support that finding. As

we noted above, we will not analyze the merits of Michael's challenge to the sufficiency of the evidence because Michael failed to provide a complete transcript of the final hearing. We will not speculate about the contents of the missing transcript pages.

Michael asserts the court's calculation of his obligation for Brittany's post-secondary education was erroneous because the court did not consider Brittany's ability to obtain employment or loans. We agree. Ind. Code § 31-6-6-2 provides:

> (a) The child support order or an educational support order may also include, where appropriate:
>
> (1) amounts for the child's education . . . at institutions of higher learning, taking into account:
>
> (A) the child's reasonable ability to contribute to educational expenses through:
>
> (i) work;
> (ii) obtaining loans; and
> (iii) obtaining other sources of financial aid reasonably available to the child and each parent; . . .

The court's order makes no mention of Brittany's ability to work or obtain loans. Therefore, it appears the court did not consider the possibility of assigning to Brittany some responsibility for college expenses. We remand for the court to consider this issue and enter an order that either: (1) makes Brittany responsible for a portion of her college expenses, or (2) explains why Brittany should not be responsible for a portion.

Michael argues the court erred in making him responsible for all Brittany's college expenses for the fall semester of 2005. The court made Debra responsible only for "payment of books, computer printer and any 'extra' food expenses for Brittany for this semester, all of which have been paid." (Appellant's App. at 21.) The court explained it did so "[b]ased on the disparity in income between the parties." (*Id.*) The court found

Michael's weekly income is more than three times Debra's, and Debra did not re-enter the workforce until after filing the petition for divorce. As Michael cannot demonstrate the evidence is insufficient to support those findings, we cannot find the court abused its discretion in so dividing the first semester college expenses.[8]

Finally, Michael claims the court erred when it required him to maintain medical insurance on Brittany until she is 23 years old, because there was no evidence to suggest she "is incapacitated." (Appellant's Br. at 1.) In fact, the court's order indicates Michael is to maintain medical insurance on Brittany "until such time as she is twenty-three years of age or otherwise emancipated." (Appellant's App. at 20.) Child support orders "may also include, where appropriate, basic health and hospitalization insurance coverage for the child." Ind. Code § 31-16-6-4. Where the court orders a parent to pay college expenses as part of a support order, the court may also order a parent to maintain health insurance for that child. *See Schueneman v. Schueneman*, 591 N.E.2d 603, 612 (Ind. Ct. App. 1992). Because the court properly ordered Michael to pay college expenses,[9] the order for him to pay for Brittany's insurance was not an abuse of discretion.

[8] Within this argument, Michael also asserts it was improper to require him to pay those college expenses without providing him a reduction for the amounts that overlapped with his support obligation, because he would thereby have been double-paying for Brittany's room and board. Michael has not directed us to evidence proving he was paying child support during the fall semester of 2005. The court's final order made Michael's support obligation "retroactive to the date of the final hearing, the same being December 16, 2005." (Appellant's App. at 20.) As Michael has not demonstrated he was paying child support to Debra that semester, we cannot hold the trial court erroneously failed to decrease his obligation for Brittany's college expenses on that basis.

[9] The fact that we must remand for the court to consider whether Brittany should be required to pay a portion of her own college expenses might alter the amount Michael will pay, but we do not envision that it might eliminate his support obligation. If the court were to place all responsibility for her educational expenses on Brittany and terminate Michael's support obligation, then a different result would be necessitated regarding the requirement Michael maintain insurance on Brittany.

CONCLUSION

We find no abuse of discretion in the court's order regarding temporary maintenance or in the majority of the court's orders regarding child support. However, because the court's order does not suggest the court considered Brittany's ability to obtain loans or maintain employment while in college and does not require her to be responsible for any portion of her education, we must remand for the court to reconsider that small portion of its order.

Affirmed in part, reversed in part, and remanded.

NAJAM, J., and MATHIAS, J., concur.